United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

B
P/S

74-2178

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLONIE HILL LTD.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER, COLONIE HILL LTD.

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No. 74-2178

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BRIEF OF PETITIONER, COLONIE HILL LTD.

Introduction

Pursuant to charges filed in Case No. 29-CA-3457 by Mauro Squicciarini (A. 3)* and in Case No. 29-CA-3462

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* References to documents contained in the Appendix filed herewith will be prefaced with the letter A followed by the page number or numbers. Petitioner also files herewith, pursuant to the provisions of Rule 30(e) of the Federal Rules of Appellate Procedure, a separate volume of exhibits, separately indexed, containing the transcript of the hearings and those exhibits presented at the hearings which are not reproduced in the Appendix hereto. References to the transcript will be designated "ET" followed by the page number of the transcript and in some instances the lines referred to. References to those exhibits contained in the exhibit volume not already reproduced in the Appendix will be referred to by the letter E followed by a small letter.

by James Staats (A. 4), the general counsel on October 25, 1973 by the Regional Director for Region 29, issued an Order consolidating cases, Complaint and Notice of Hearing (A. 5 through 10), alleging that petitioner violated Sections 8(a)(1)(2) and (3) of the National Labor Relations Act, as amended, 29 U.S.C.A. Section 151, et seq., herein called the Act.

Hearing on the above entitled cases was heard before an Administrative Law Judge on December 17th and 18th, 1973 (ET. pp. 1 through 180) (A. 15).

On February 25, 1974 the Administrative Law Judge filed a Decision and Order (A. 16 through 31). Thereafter, general counsel filed exceptions (A. 32 through 36), and petitioner filed cross-exceptions (A. 37 through 52) to the Decision and Order of the Administrative Law Judge with the National Labor Relations Board.

Thereafter, pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended the National Labor Relations Board, hereinafter referred to as the Board, delegated its authority in this proceeding to a three member panel which issued a Decision and Order on August 6, 1974 (A. 53 through 58) affirming in part and modifying in part the Decision and Order of the Administrative Law Judge. It is from the Order of the National Labor Relations Board, except as modified, that petitioner now seeks review pursuant to Rule 15 of the Federal Rules of Appellate Procedure.

Statement of Issues Presented

1. Upon certification of Local 100 Service Employees International Union, AFL-CIO, hereinafter called Local 100, as the exclusive representative of the employee unit stated in the Certification dated December 26, 1972 (E j), a voluntary temporary assumption by both petitioner and Local 100, of the prior contract dated March 4, 1972 (E n)

was made by petitioner and Local 100 until a new contract could be and was negotiated in July of 1973, and such voluntary assumption was not barred either by the settlement agreement (E 1) or otherwise.

Accordingly, petitioner did not contribute support and assistance to Local 100 except to the extent authorized in Section 8(a)(3) of the Act until after Local 100 was certified on December 26, 1972.

2. General counsel failed to sustain his original burden or proof that Mauro Squicciarini was discharged for engaging in protected and concerted activities during the times mentioned in the consolidated complaint, and petitioner sustained its burden of proof in establishing its affirmative defense that Mauro Squicciarini was discharged lawfully and for cause.

Statement of the Case

On March 4, 1972, petitioner and Local 100 entered into a collective bargaining agreement which by its terms was to remain in effect from February 26, 1972 for a period of three years, to expire on February 25, 1975 (E n, page 10).

Thereafter, on November 2, 1972 (ET. 41), an informal settlement agreement was executed by petitioner, Local 100 and Local 164 Hotel and Restaurant and Bartenders International Union, AFL-CIO, wherein both petitioner and Local 100 agreed to do and not to do certain things "unless and until (Local 100) shall have been certified by the National Labor Relations Board as the exclusive representative of such employees" (E 1). Among other things, the parties agreed not to give any force or effect to the collective bargaining agreement between petitioner and Local 100 dated March 4, 1972.

Thereafter, on or about November 30, 1972, a petition was filed by Plumbers Local Union 775 of the United Asso-

ciation of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, (hereinafter referred to as Local 775), requesting that a representation election be held for the purpose of determining the bargaining representative of all maintenance mechanics employed at petitioner's establishment (E e).

Thereafter, on December 5, 1972 a Motion to Intervene in said foregoing election was filed by Local 30, International Union of Operating Engineers, AFL-CIO (hereinafter referred to as Local 30), and to participate in the same election (E h).

On December 6, 1972, the petition of Local 775 to intervene in the election was withdrawn (E q), and the Motion to Intervene filed on behalf of Local 30 was also withdrawn prior to the election (ET. 35).

On December 14, 1972 the election was held and the ballots tallied by the Board (E i), and on December 26, 1972, Local 100 was certified by the Board as the exclusive representative of all employees in the unit set forth in the certification, including service and maintenance employees (E j).

On June 24, 1973 Mauro Squicciarini was discharged by the petitioner. On June 25, 1973, Mr. Squicciarini filed a charge against the petitioner, alleging that he had been terminated "because of his protected, concerted activities" (A. 3).

In July, 1973, petitioner and Local 100 entered into a new written collective bargaining agreement (ET. 42).

It is the petitioner's contention, and it is submitted that the evidence so substantiates, that petitioner and Local 100 orally agreed, after Local 100 was certified on December 26, 1972, to abide by and live together according to the provisions of the agreement of March 4, 1972 until such time

as a new contract could, and was, negotiated in July of 1973; and that such agreement included all of the provisions of the contract including the provisions concerning union security. Accordingly, any statements made by any employees or agents of petitioner to employees in the bargaining unit concerning the necessity of joining Local 100 were proper and lawful to the extent authorized in Section 8(a)(3) of the Act.

The petitioner further contends that the evidence clearly shows that Mauro Squicciarini did not engage in any protected or concerted activities at any time after Local 100 was certified on December 26, 1972 (the only period of time referred to in the consolidated complaint), and that his discharge in June of 1973 was caused by his voluntary slowdown in performing the work assigned to him.

ARGUMENT

POINT I

After certification of Local 100 on December 26, 1972, a voluntary assumption was made by both petitoner and Local 100 of the prior contract of March 4, 1972, which assumption was not barred by the settlement agreement or otherwise and was merely to bridge the gap until a new contract was negotiated.

The Administrative Law Judge erroneously held that petitioner was in violation of Sec. 8(a)(1) and (2) of the Act by lending "substantial support and assistance to Local 100 and interfered with, restrained and coerced employees" . . . "at a time when no valid collective bargaining contract requiring union membership was in existence . . ." (A. 25). This conclusion was apparently affirmed by the Board, although in footnote 3 of its Decision and Order (A. 54), the Board specifically and quite properly rejected the Administrative Law Judge's conclusion that

from the mere fact that respondent executed a settlement agreement, its pre-settlement conduct was unlawful. It follows, *a fortiori,* that it is equally improper to conclude from the mere fact that respondent executed a settlement agreement to cease enforcing an existing collective bargaining agreement, that such collective bargaining agreement was also unlawful. Indeed, the very last paragraph of the settlement agreement itself (E 1) specifically states that all parties agree that signing the settlement agreement "shall not be deemed to constitute an admission that any of them have violated the Act."

A further example of how the Administrative Law Judge, and the Board in apparently affirming that portion of his decision, exceeded and went beyond the scope of the consolidated complaint as well as the original charges filed by both Squicciarini and Staats is clearly shown in that portion of his decision designated as III B (A. 18). III contains the heading "The Alleged Unfair Labor Practices." Heading B under III is entitled "Acts of Assistance to Local 100 After the Settlement Agreement and Before Certification." Petitioner has read and reread both the original charges of Squicciarini and Staats as well as the consolidated complaint and finds that nowhere in said charges or said consolidated complaint is it charged or alleged that petitioner was in violation of the Act during such period of time. The only period of time during which petitioner is alleged to have violated the Act in the charges and in the consolidated complaint is the period after the certification of Local 100 on December 26, 1972 up to the date of Mr. Squicciarini's discharge on June 24, 1973. Accordingly, any and all findings and conclusions of the Administrative Law Judge's decision as affirmed by the Board's Decision and Order, concerning such alleged illegal acts are wholly improper and grossly in excess of the relief sought in the consolidated complaint and should be set aside.

It is submitted that the evidence fairly proponderates, since absolutely no testimony or evidence was submitted

by the General Counsel in rebuttal thereof, that the settlement agreement between petitioner and Local 100 clearly and specifically contemplated that Local 100, at some future date, might become certified, and that, upon the happening of such event, the settlement agreement itself could be terminated. No other reasonable interpretation can be given to the plain words ". . . unless and until said labor organization shall have been certified by the Board as the exclusive representative of such employees."

The evidence clearly proponderates, and again general counsel submitted absolutely no testimony or evidence to the contrary, that some time after Local 100 was duly certified on December 26, 1972, the president of Local 100 and the president of petitioner orally agreed to and did in good faith operate and live together under the provisions of the old contract of March 4, 1972 until a new contract could be "hammered out" between them. The law is clear that a collective bargaining agreement need not be in writing and may be oral when not otherwise required by statute and the parties themselves make no objection to leaving it in oral form. *United Shoe Workers of America, CIO* v. *Le Danne Footwear, Inc.*, 83 F. Supp. 714 (D.C.D. Mass. 1949); *Hamilton Foundry & Machine Co.* v. *International M. & F. Workers,* 193 F. 2d 209, 214 (6 Cir. 1952) cert. den. 343 U.S. 966 (1952).

In the *Hamilton Foundry* case the Sixth Circuit Court, in holding that the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 *et seq.* and as amended by the Labor Management Relations Act of 1947, 29 U.S.C.A. § 158(d), does not require written agreements where neither party so requests, stated (193 F. 2d at p. 214):

> "We do not agree with appellees' contention that the National Labor Relations Act, as amended, 29 U.S.C.A. § 151 et seq., requires the collective bargaining agreement to be reduced to writing and signed in order to be valid. The Act does not so state. In H.J. Heinz

> Co. v. N.L.R.B., 311 U.S. 514, 61 S. Ct. 320, 85 L. Ed. 309 and Cox v. Gatliff Coal Co., D. C., 59 F. Supp. 882, affirmed 6 Cir., 152 F. 2d 52, it was stated that the Act contemplated that a collective bargaining agreement be in writing. Since those decisions, the Act has been amended by the Labor Management Relations Act of 1947, by which collective bargaining was defined as including 'the execution of a written contract incorporating any agreement reached if requested by either party'. Section 158(d), Title 29 U.S.C.A. In our opinion, this contemplates valid oral agreements where neither party requests a written instrument. N.L.R.B. v. Scientific Nutrition Corp., 9 Cir., 180 F. 2d 447, 449; United Shoe Workers v. Le Danne Footwear, D.C. Mass., 83 F. Supp. 714."

In *Food Handlers Local No. 425* v. *Arkansas Poultry Coop. Inc.*, 199 F. Supp. 895 (D.C.W.D. Ark. 1961) the rule was explained thus (199 F. Supp. at p. 901):

> "Although the plaintiff union does not deny that there was a cancellation of the prior written agreement, it contends that there was a valid oral agreement existing at the time that the present dispute arose, and it cited the cases of Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union of North America, 193 F. 2d 209 (6 Cir. 1952), and Wilson & Company, Inc. v. N.L.R.B., 115 F. 2d 759 (8 Cir. 1940), to support the proposition that the National Labor Relations Act does not require that collective bargaining agreements be reduced to writing and be signed in order to be valid. It is true that the above-mentioned cases stand for that generally accepted proposition, but it is to be noted that both of these cases and others holding the same way presuppose some circumstances which establishes the oral agreement for purposes of bridging a period of negotiation or renegotiation, whether it be a provision of a prior

written agreement or a formal oral compact between the parties. In the present case, there was neither of the above circumstances which would indicate to the court that the union and the employer had provided for such an oral agreement to bridge the interim period of negotiation between the cancellation of the written agreement on November 15, 1959, and the signing of a new written agreement."

See also *Wilson & Co.* v. *N.L.R.B.*, 115 F.2d 759 (8 Cir. 1940).

Admittedly, the law is otherwise where any of the parties objects to such form or disagrees with another party concerning the terms thereof. In the instant matter the only objection to the oral agreement is by the General Counsel who is not a party to the agreement. The evidence in the record clearly establishes an oral agreement to bridge the period of re-negotiation.

The N.L.R.B. has held that where an election is won by a rival union, the winning rival union is not required to assume the contract of the defeated union or to consider how its own certification affects that contract. *Hershey Chocolate Corp.*, 121 N.L.R.B. 901 (1958). Moreover, where the rival union wins the election, it is the sole bargaining agent and has a right to negotiate its own contract; however, nothing prohibits the winner from voluntarily assuming the contract if it so chooses. *Hershey Chocolate Corp., supra.* If a contracting union, however, wins an election requested by a rival union, the legal status of the contract is in no way affected and the union is still bound by it. *Hershey Chocolate Corp., supra.*

In the instant matter, Local 100 and respondent had entered into a settlement agreement by which they mutually agreed not to do certain things "unless and until" Local 100 shall have been certified by the Board. This informal settlement agreement, which was signed and ap-

proved by both the attorneys for the National Labor Relations Board and the Regional Director (E. 1), also contained a proviso which, by the General Counsel's own admission, is a standard proviso "in all Board settlements" (ET. 119) Yet it is this very standard proviso and the clause in which it is contained in the informal settlement agreement, that the Administrative Law Judge maintains cannot be orally overridden or controlled by the parties' clearly stated implication that the settlement agreement could be terminated upon the happening of the contemplated event, namely, the certification of Local 100.

General Counsel contended, and the Administrative Law Judge agreed, that the testimony of Mr. Conlon that he was told by his employer, Mr. DeLillo, the President of petitioner, in the presence of the president of Local 100, Mr. O'Keefe, that DeLillo and O'Keefe had orally agreed to continue operating under the old agreement "until a new one could be hammered out," was hearsay testimony and of no probative value. Such rule by the Administrative Law Judge is erroneous and should be set aside. It is axiomatic that hearsay testimony may be received in the administrative proceedings.

But Mr. Conlon's testimony is not hearsay. Where the issue is whether a party has acted prudently, wisely or in good faith, the information on which he acted, whether true or false, is original and material evidence and not hearsay. *Ohio Associated Tel. Co.* v. *N.L.R.B.*, 192 F. 2d 664, 667 (6 Cir. 1951); *Winchell* v. *Moffat County State Bank*, 307 F. 2d 280, 282 (10 Cir. 1962).

But even if Mr. Conlon's testimony in this connection should be held to be hearsay, it was clearly admissible hearsay since Mr. Conlon was testifying to his own state of mind in consequence of the utterance. *Schwarzenbach-Huber Company* v. *N.L.R.B.*, 408 F. 2d 236, 247 (2 Cir. 1969), cert. den. 396 U. S. 960 (1969); *Atlanta Corporation* v. *Olesen*, 124 F. Supp. 482 (D.C.S.D. Cal. 1954).

Mr. Conlon testified that although he had met Mr. O'Keefe prior to becoming employed by Colonie Hill in March of 1973, he met him again after being employed by Colonie Hill in Mr. DeLillo's office and that (ET. 161 and 162):

> ". . . on this occasion Mr. DeLillo explained to me that Mr. O'Keefe was president of the Union which had been recognized and elected in representing the employees and that any matters having to do with the representation of Local 100 with the premises, with the complex, I should feel free to discuss them with Mr. O'Keefe.
>
> He indicated that there was an agreement in effect and had been in effect since the National Relations Board proceedings, that that agrement had gone back to just when the place opened under the tenancy, and that until a new agreement was in their language, hammered out, that the agreement that was in effect prior would continue in effect and that there would be a continuity under that old agreement.
>
> That meeting took place in Mr. DeLillo's office and frankly, it was around . . . it was about March of this year."

The uncontradicted testimony of Mr. Napolitano further demonstrates that petitioner acted in good faith in continuing to operate under the substantive features of the agreement of March 4, 1972, until a new collective bargaining agreement was entered into between Local 100 and the petitioner in July of 1973 (ET. 61). He further testified (ET. 91-92) that he and Mr. Russo assumed "that after the certification that that contract would still be enforced, would be legal . . . total until a new one was signed. That was decided by myself and Mr. Russo in the conversation" (ET. 92). He further admitted that he had not discussed this with the union at all and that "they didn't tell us a

thing what to do either, to be truthful at that point'' (ET. 92). Mr. Napolitano freely admitted that after the certification of Local 100 on December 26, 1972, the union security clause was continuously enforced by Colonie Hill (ET. 93), but that nobody was ever fired for failing to join the union (ET. 93). He admitted that the check-off provisions of the old contract were continued (ET. 93 and 94) for those employees who were union members having signed authorization cards for such check-off (ET. 96); and that he thought that the provisions concerning time and a half pay for working on holidays was enforced after certification but he could not remember specifically because of the confusion between November and December of 1972 (ET. 98 through 104); and that the provisions with regard to vacation were enforced after certification (ET. 104) as well as the provisions with respect to union welfare payments (ET. 104) and wages (ET. 105).

The record is patently clear that after certification, petitioners' employees, whether by information and instruction from the president, Mr. DeLillo, or by a simple good faith assumption that it was usual and customary to do so, temporarily resumed enforcing the provisions of the collective bargaining agreement of March 4, 1972 until the new contract was signed in July. And the record contains absolutely no testimony or evidence whatsoever that the officers or members of Local 100 registered any objection or complaint to such resumption.

Indeed, the only objection raised was that of general counsel during the hearings (ET. 118 through 121—l. 5), and the general counsel's objection is grounded solely on the allegation, which is not one of the allegations contained in the consolidated complaint or in the original charges filed by Mr. Squicciarini and Mr. Staats, that the contract of March 4, 1972 was an unlawful contract. As has been previously noted the Board struck out the comments of the Administrative Law Judge concerning references to the

contract as having been illegal and, accordingly, general counsel's objections based upon the same allegations are shockingly improper and should be set aside in their entirety.

POINT II

General counsel failed to sustain his original burden of proof to establish that petitioner violated the Act during the times mentioned in the consolidated complaint, and petitioner sustained its burden of proof on its affirmative defense that Mauro Squicciarini was discharged for cause.

The law is well settled that the general counsel has the burden of proving an unfair labor practice in the original proceedings against a respondent. *N.L.R.B.* v. *Goodyear Footwear Corp.*, 186 F.2d 913 (7 Cir. 1951). In holding that the evidence presented by the general counsel was insufficient to support the findings of the Board that the employer engaged in unfair labor practices, the Court in *Goodyear Footwear* stated (186 F.2d at pp. 916 and 917):

> "I. As we stated in N.L.R.B. v. Reynolds International Pen Co., 7 Cir., 162 F.2d 680, at page 690, in discussing alleged wrongful discharges: 'The Board argues the discriminatory nature of these discharges as though the burden was upon respondent to exonerate itself of the charges made against it. The burden, however, was upon the Board to prove affirmatively and by substantial evidence that (naming persons) were discharged because of union membership and activities and for the purpose of discouraging membership in the union.'
>
> * * *
>
> "In other words the Board in its decision, starts out by assuming that the respondent company has the burden of disproving the charge. In the Board's opinion, any evidence it offers in denial must be corroborated.

> The law, of course, is otherwise. The burden was on the Board to prove the charge made by substantial evidence. N.L.R.B. v. Reynolds Co., 7 Cir., 162 F.2d 680."

See also *N.L.R.B.* v. *Mastro Plastics, et al.*, 354 F.2d 170, 175 (2 Cir. 1965), cert. denied 384 U.S. 972 (1966).

The petitioner has asserted, and it is submitted that the evidence clearly preponderates, that Mr. Squicciarini's attitude and demeanor noticeably changed after Mr. Lockhart was appointed supervisor in late February or early March of 1973 resulting in Mr. Squicciarini's slowing down on the job and, ultimately, his discharge. The Administrative Law Judge found, and the Board apparently affirmed, that Mr. Squicciarini's discharge was not for cause and therefore, by implication only, that he was discharged for engaging in protected and concerted activities in violation of the Act.

It is submitted that the general counsel in the instant matter has totally and completely failed to sustain his original burden of proof that Mr. Squicciarini was discharged, in June of 1973, for engaging in protected and concerted activities during the periods stated in the consolidated complaint. The burden of proof of showing that Mr. Squicciarini was discharged for cause was not upon the petitioner. Petitioner's assertion that Mr. Squicciarini was discharged for cause was an affirmative defense and the evidence presented in connection therewith was merely in accordance with petitioner's general burden of going forward with the evidence and establishing its affirmative defense. *N.L.R.B.* v. *Mastro Plastics Corp., supra.* Whether or not the petitioner met that burden of going forward with the evidence, which petitioner believes it did, become totally irrelevant in view of the general counsel's complete failure to produce any testimony or evidence to sustain his original burden of proof to show that Mr. Squicciarini was discharged because he engaged in protected and concerted ac-

tivities during the times referred to in the consolidated complaint.

If there is any one thing that stands out upon a fair reading of all of the evidence presented in this matter, it is that Mr. Squicciarini did not engage in any concerted or protected activities for the purpose of collective bargaining and mutual aid and protection during the times alleged in the consolidated complaint. Whatever the reason was that brought about Squicciarini's discharge, and petitioner submits that the entire record clearly substantiates that it was for cause, the evidence simply does not establish that Mr. Squicciarini's discharge was occasioned by his activities on behalf of either Local 30 or Local 775 or his opposition to Local 100. Indeed, the general counsel presented absolutely no evidence that Squicciarini engaged in any concerted or protected activities after the certification of Local 100 on December 24, 1972.

Squicciarini testified (ET. p. 12) that he was first employed by Colonie Hill on March 13, 1972, and that his first contact with Local 30 was ". . . probably the beginning of November, 1972" (ET. p. 12 l. 21). It is quite notable, however, that the designation card which Squicciarini signed (Staats also signed one at the same time), designating Local 30 as his representative for the purpose of collective bargaining, is dated December 4, 1972 (E k and m). It is even more remarkably noticeable that the Notice of Motion filed by Local 30 for permission to intervene and be placed upon the ballot in the election scheduled for December 14, 1972, is dated December 5, 1972, one day after Squicciarini signed the aforementioned designation card. This Motion to Intervene was subsequently withdrawn by Local 30 with the consent of the N.L.R.B. (ET. 35—ls. 16-19), as was the Petition to Intervene filed by Local 775 (E e and g). Squicciarini's own testimony is that he never joined either Local 30 or Local 775 (ET. 28). The foregoing constitutes substan-

tially all of the evidence presented by general counsel relative to Mr. Squicciarini's protected activities, and while it does raise serious questions as to the propriety of the intervention of Local 30, such questions are wholly irrelevant to the issues involved herein.

Squicciarini further testified (ET. 30 ls. 7-11) that his lay-off in January of 1973 was not because of his membership in some union for the simple reason that "the union wasn't in effect at that time so it couldn't have been a lay-off for that reason." Indeed, one cannot help wondering why, if he had been laid off in January of 1973 for union membership or activities on behalf of the rival unions, he was rehired in February of 1973? Such rehiring hardly constitutes evidence that Mr. Squicciarini "was a troublesome threat to Local 100's continued representation of the maintenance department" (A. 26). It is, rather, evidence to the contrary.

The fact of the matter is that there is not a scintilla of evidence in the entire record that Mr. Squicciarini engaged in any kind of concerted activities or protected activities on behalf of other unions after Local 100 was certified in December of 1972 (the only period alleged in the consolidated complaint). By his own admission he was laid off in January for other reasons, namely that "the company was slow, wasn't making any money" (ET. 30) and he was, admittedly rehired by the petitioner in February of 1973.

Whether or not Mr. Squicciarini was or was not promised a supervisory job upon being rehired in February of 1973 is wholly irrelevant to the allegation that he was discharged in June of 1973 "because of his protected, concerted activities" (A. 3). Even if Mr. Napolitano had made such a promise to Mr. Squicciarini (ET. 18—ls. 13-16), which Mr. Napolitano denied (ET. 66—ls. 5-16), the fact that Mr. Napolitano thereafter was not able to fulfill the alleged promise is irrelevant to the charge that Mr. Squicciarini was discharged for engaging in protected and concerted

activities. Nor could such alleged unfulfilled promise, standing alone, constitute a reasonable basis for ordering petitioner to reinstate Mr. Squicciarini.

However, it is submitted that the evidence clearly preponderates that the cause of Mr. Squicciarini's discharge in June of 1973 stemmed from his disappointment over the fact that Mr. Lockhart, and not he, was appointed to the supervisory job, resulting in his feeling that "he has had it with Colonie Hill . . ." (ET. 124, l. 23) and his subsequent slowing down on the job.

Mr. Squicciarini testified that about a week and a half after his conversation with Mr. Napolitano, in February of 1973, in which he was allegedly promised the supervisory job, he was approached by Mr. Trockel, the Personnel Manager, and asked whether he was going to join the union (ET. 18 and 19). He replied that ". . . so far as I understand, I am in a supervisory category and I don't have to join the union" (ET. 19). It is submitted that this testimony shows that Mr. Squicciarini preferred not to join any union, whether it be Local 100, Local 30 or Local 775, and demonstrates a complete lack of advocacy or preference for any union, whether it be Local 30, Local 775 or Local 100. This singular bit of testimony is significant in evidencing the state of mind of one who was allegedly discharged for engaging in protected and concerted activities.

Accordingly, it is respectfully submitted that the Board's order affirming the Administrative Law Judge's finding that Mr. Squicciarini was discharged in violation of the act be set aside in its entirety.

CONCLUSION

Accordingly the Decision and Order of the Board dated August 6, 1974, affirming, except as modified, the Decision and Order of the Administrative Law Judge dated February 25, 1974, should be set aside in its entirety.

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Certificate of Service

IT IS HEREBY CERTIFIED that a true copy of the foregoing Brief of Petitioner, a copy of the Appendix and a copy of a separate Exhibit Volume was mailed to the National Labor Relations Board, Office of the General Counsel, Attention Hope Zelasko, Esq., and Michael Winer, Esq., Washington, D. C. 20570, this 9th day of December, 1974.

HYNES & DIAMOND

By: Ralph C. Kreimer
Ralph C. Kreimer

(57142)